

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**FOY & MARIOTTI INSURANCE INC.**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid commissions  
RSA 275:43 I unpaid wages  
RSA 275:43 V unpaid employee expenses  
RSA 275:44 IV liquidated damages

**Employer:** Foy & Mariotti Insurance, Inc.  
PO Box 1030  
Exeter, NH 03833

**Date of Hearing:** August 6, 2014 and September 9, 2014

**Case No.** 48156

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on May 28, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on July 3, 2014. The hearing started on August 6, 2014 and was continued on September 9, 2014.

The Wage Claim was filed in four different areas of the law. One filing was for unpaid commissions, unpaid employee expenses and liquidated damages for these two areas. There was also a late check that the claimant requested liquidated damages because it was not timely. There was also a filing for expenses suffered in filing the Wage Claim. The total amount was for \$10,493.02.

The claimant testified that one of the areas he is including in this Wage Claim is an estimated commission of \$4,000.00 on the Paolini accounts. The testimony shows that these accounts were being serviced by one of the owners, Daniel Mariotti. The claimant testified that he was working with the owner to do various assignments on these accounts. The claimant said that he worked nights and on weekends with these accounts. Although there was no

written agreement to the commissions on these accounts, the claimant said that he often approached the owner about payment and he was told that he would get it.

The claimant also seeks payment for expenses suffered for the employer. He stated that some were paid and some were not. He said that he brought up these expenses many times but did not push the issue because he did not want, ".....to make waves". The amount he is seeking for these expenses is \$1,051.60.

The claimant is also seeking liquidated damages on all of the commissions not paid and on the expenses not paid. The claimant also testified that he received a check for \$303.97 for commissions. The check was not paid within 72 hours of his separation from employment and so he is also seeking liquidated damages on this amount.

The last part of the Wage Claim deals with the expenses suffered by the claimant in the preparation of this Wage Claim. The claimant testified that he spent \$85.85 for these expenses.

The employer testified that the claimant did work on the Paolini accounts but he was never the lead person on them. The employer presented a notarized statement from Mr. David Paolini that he never had any contact with the claimant. The claimant could not remember which accounts he worked on because so much time had passed. The claimant also said that he did not enter the records into the employer's computer system because he did not know that he had to do so. The employer stated that he did not talk about sharing any commissions on the Paolini accounts.

The employer also stated that the claimant was paid expenses when they were properly submitted. There were times when expenses were requested to a location without a client's name being attached. In a case like this the expenses would not be paid. One of the problems was that the claimant kept his records on his personal computer rather than the office computer system.

The employer did say that when commissions were due and owing the claimant received a check. The request for liquidated damages for one commission was not delayed because of a willful act but an act of putting the records together.

The employer feels that the claimant was upset after he left the company when the company challenged him on a non-compete agreement. The issue of this agreement is not a part of the Wage Claim but the employer maintains that this led to the filing of the Wage Claim. All claims were made after the letter from the employer.

The employer states that all wages have been paid. Some were paid early before the payment from the client was received. The expenses being questioned, some were paid before these requests and some were paid after the requests.

### **FINDINGS OF FACT**

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when

permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This section of the law mandates that all wages must be paid when the wages are due and owing.

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This part of the law places an issue such as commissions into the category of wages when the commissions are due and owing.

RSA 275:43 V. Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

This section of the law places an issue, such as employee expenses, into the category of wages when the expenses are due and owing.

RSA 275:44 IV reads: "If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10% of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition."

This part of the law allows for a claimant to seek liquidated damages up to the amount of the Wage Claim. The request would be made for the Hearing Officer to find that the employer was willful and did not have good cause for their action(s).

It is the finding of the Hearing Officer, based on the written evidence and the testimony presented for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and he did not meet this burden.

The issue of the commissions was based on one client and multiple policies. The lead person for this client was one of the owners. The claimant testified that any commissions due to him were based on conversations with the owner. The claimant testified that he worked many hours on these policies and was told that he was to be paid. The owner stated that there was no promise for this to be done. The holder of the policies also submitted a signed statement that he never had any meeting or any dealings with the claimant.

The employee expenses were those expenses not paid when the proper forms were not filled out for reimbursement. The employer testified that all expenses were paid when requested and verified. The claimant never raised this issue while employed at the company.

There was a request for liquidated damages for a check that was received after the claimant separated from employment and after the legal 72 hours. The employer testified credibly that this check was for commissions that were paid once the client paid.

The claimant did not provide credible testimony about the Wage Claim and did not prove that there were wages due and owing. The Wage Claim is invalid.

### **DECISION AND ORDER**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: October 6, 2014

Original: Joseph G. Frechette

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cc: Foy & Mariotti Insurance Inc.

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